IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 38 of 1980

BETWEEN:

MOHAMMED YUSUFF KHAN s/o
Mohammed Hanif Khan

Appellant

and

JABIDA KHATOON d/o
Mohammed Tahir

Respondent

H.K. Nagin for the Appellant.
No appearance of the Respondent.

Date of Hearing: 4th September 1980
Delivery of Order: 30 September 1980

ORDER OF COURT

Gould V.P.

This is an appeal from an order of the Supreme Court dismissing a petition for divorce on proceedings brought in the Magistrate's Court.

The petitioner has been represented by counsel throughout the proceedings but his wife the respondent has never appeared at any stage. The petition was heard by the Magistrate on the 3rd April, 1980, and was based on the ground of wilful and persistent refusal to consummate the marriage. Evidence was given by the petitioner and his father, and the Magistrate recommended that the petition be dismissed for want of sufficient evidence. He said that he was not satisfied that the petitioner had made out his case.

On the 30th April, 1980, the recommendation of the Magistrate was considered by the learned Judge in the Supreme Court, who accepted the recommendation of the Magistrate that the petition be dismissed, but for different reasons. In the learned Judge's view the evidence adduced by the petitioner and his witness indicated that the respondent had deserted the petitioner, but a decree on the ground of desertion was not in the circumstances available.

On the 30th June, 1980, there were delivered two judgments of this Court relating to cases in which very similar facts and grounds for divorce were considered. They were Vineeta v. Rajeshwar Nath (Civil Appeal No. 31/80) and Arvindbhai Zaverbhai Patel v. Pushpa Wati Ben (Civil Appeal No. 4/80) and all that it is necessary to say about them is that they indicate that it is possible for parties to make a valid agreement that after they have been married by civil procedure in a Registry Office, there shall be no consummation of the marriage until an agreed or customary religious ceremony has taken place. The difference between the results arrived at in the two cases illustrates the importance of having clear evidence on the question that arises where it is alleged that one of the parties has refused to proceed with the ceremony and that there has been wilful and persistent refusal to consummate the marriage by that party. An important evidential matter is that so long as such an agreement, that is, an agreement that there will be no consummation until after the religious ceremony, remains in full force and effect such refusal may be justified.

Returning to the learned Judge's decision, it appears to us that had these judgements been available to him prior to his order, his view may well have been affected by them: he should

therefore have an opportunity of looking at the evidence again in the light of the view of the law as so expressed. If he finds the evidence inadequate for a decision one way or the other he might prefer to exercise his discretion by remitting the case for further evidence and it is always open to him to seek the assistance of submissions from counsel.

In the circumstances therefore we set aside the order of the learned Judge in the Supreme Court and remit the case to him for further consideration and the making of such order as he may think proper.

(SGD.) T. Gould
VICE PRESIDENT

(SGD.) C.C. Marsack
JUDGE OF APPEAL

(SGD.) T. Henry
JUDGE OF APPEAL